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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JAMES J. FRANICEVICH et al., Plaintiffs and Appellants, v. ROBERT HOWARD PETERSON, Defendant and Respondent.	A138435 (San Francisco City & County Super. Ct. No. CGC-12-526309)

I.

INTRODUCTION

This appeal stems from the lawsuit between the relatives of decedent Helen Peterson (Helen)[1] and her attorney, respondent Robert Howard Peterson. After Helen's death, appellants James J. Franicevich (Jim) and Michael Milan Stipic, Jr. (Mike), Helen's second cousin and nephew, respectively, filed a complaint alleging a 50 percent interest in Helen's estate based on claims against respondent of legal malpractice, breach of contract, and negligent interference with prospective economic advantage. The trial court sustained respondent's demurrer to dismiss the complaint. On appeal, appellants claim they are owed a legal duty of care by respondent. Appellants contend respondent committed legal malpractice by failing to exercise his duty of care and proper professional diligence, and that respondent breached a contract with appellants because

[1] At times we refer to Helen Peterson and appellants by their first names only for clarity, and to avoid any confusion with respondent Robert Howard Peterson, who is not related to Helen7. No disrespect is intended by such usage.

"they were intended third-party beneficiaries of Helen's will." Lastly, in appellants' tortious interference with prospective economic advantage claim, they argue they each had a legitimate expectation of a 25 percent share of Helen's estate upon her death, respondent knew that she intended such bequests, and his inaction interfered with appellants' expectation of the economic advantage of each being a 25 percent beneficiary of Helen's estate.

We reject each of these contentions and affirm the order dismissing the complaint.

II.

FACTS AND PROCEDURAL HISTORY

As alleged in the underlying complaint, the material facts are as follows: Respondent was Helen's estate planning attorney before her death on December 7, 2011. In 2000, when Helen's husband and brother passed away, Helen's then-existing will and trust left all of her estate to the First Church of Christ Scientist in Boston, Massachusetts (the Church). After 2000, Helen's nephew Mike and her second cousin Jim began to visit and care for Helen. Over time, one or both of them would visit Helen daily, and they assumed roles as Helen's caregivers, housecleaners, and companions.

In November 2011, Helen told Mike that it was time to change her will. She asked him to call respondent, her attorney, and ask that he come to her apartment to meet and discuss the changes she would like to make to her estate plan. Mike asked Helen whether she wanted her accountant, Jim Hopfer, to attend the meeting, and Helen said "yes." On November 30, 2011, Helen, respondent, Hopfer, and Mike met in Helen's apartment. At this time, Helen was very frail and her health was rapidly declining. She coughed repeatedly and spoke with a very faint voice. During the meeting, Helen told respondent that she wanted to change her will and trust to leave 25 percent to Mike, 25 percent to Jim, and 50 percent to the Church. Helen also wanted Mike and Jim to be co-executors of her will, and to have a power of attorney for her. Hopfer asked Helen to confirm the proposed amendments so there would be no doubt those were her wishes. Respondent stated that he would make Helen's desired changes to her trust and will, and would

prepare those documents for Helen's signature, due attestation and witnessing within the week, specifically, no later than December 6, 2011.

The following day, December 1, 2011, respondent prepared and sent Helen a bill for his November 30 services, which stated: "11/30/2011 Home visit with Helen Peterson re trust amendment, power of attorney, Heath care directive, and Will[.] [¶] For professional services rendered [¶] 2.00 hours[;] [¶] Balance due [$]500.00[.]" On the morning of December 5, 2011, Hopfer called respondent and left a voicemail stressing that time was of the essence in making the changes to Helen's will that she had requested during the November 30 meeting.

On December 7, 2011, Helen's health continued to deteriorate and Jim stopped by three times to check on Helen. Mike called respondent to make sure that respondent had made Helen's requested changes to her will and trust. Respondent stated that he had not done so, and that the will and trust amendments would not be ready for another week. On the afternoon of December 7, 2011, Mike was with Helen when she lapsed into unconsciousness, and he immediately called 911. Helen died shortly after the paramedics arrived.

The following day, December 8, 2011, Mike and Jim visited respondent's office. Because no amendments to Helen's estate plan had been made, Mike and Jim received nothing from the will. Respondent remarked that Mike and Jim might write to the Church to explain Helen's wishes that they obtain half of her estate and perhaps the Church might honor her wishes. The Church has declined to do so.

On November 21, 2012, Mike and Jim filed the underlying lawsuit against respondent, asserting causes of action for legal malpractice, tortious interference with prospective economic advantage, breach of contract, and intentional interference with prospective economic advantage.[2]

[2] In appellants' reply brief, they withdrew their appeal as to the claim of intentional interference with prospective economic advantage. Accordingly, we need not consider that claim here.

In their complaint, appellants alleged that due to respondent's inaction and conduct, they suffered significant monetary losses. Their stance as to the breach of contract claim is that respondent breached a contract with them because they were intended third-party beneficiaries of Helen's will. They further contend respondent committed legal malpractice by failing to exercise his duty of care and proper professional diligence as to appellants. Lastly, in appellants' tortious interference with prospective economic advantage claim, they argue they each had a legitimate expectation of a 25 percent share of Helen's estate upon her death, respondent knew that Helen intended such a bequest, and respondent's inaction interfered with their expectation of an economic advantage of each being a 25 percent beneficiary of Helen's estate.

Respondent filed a demurrer to the complaint, arguing that the complaint stated no claim as a matter of law because appellants never had an attorney-client relationship with him, and were not identified as express intended beneficiaries of Helen's last will and trust. Respondent characterized appellants as "potential beneficiaries" of Helen's will, and thus third parties to whom respondent owed no duty. In addition, respondent argued that extending an attorney's duty of care to third parties could compromise improperly the attorney's primary duty of undivided loyalty to the client, making the attorney the arbiter of the dying client's true intent.

The trial court sustained respondent's demurrer to the complaint on January 29, 2013, without leave to amend, concluding that for the breach of contract and legal malpractice claims, appellants were not intended beneficiaries as they were not the subject of a specific bequest by Helen. The court found that appellants were merely "potential beneficiaries," and respondent owed no duty to potential beneficiaries of his client Helen's estate. The court's rationale was that a testator's attorney does not owe a duty of care to a non-client who alleges he or she was a potential beneficiary of the testator's estate "in the absence of an executed will or trust instrument expressly reflecting the testator's intent." In so holding, the trial court relied on *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 86 (*Chang*). As for the claim of tortious interference with prospective economic advantage, the court also sustained the demurrer,

explaining that a cause of action sounding in negligence requires that the defendant owed plaintiffs a duty, and appellants could not prevail because respondent owed them no such duty.

III.

DISCUSSION

A. Standard of Review

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the complaint to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) We give the complaint a reasonable interpretation, " ' "treat[ing] the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." [Citation.] . . .' . . . [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126). We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452.)

Where the trial court has sustained a demurrer without leave to amend, the second question we must address is whether the trial court abused its discretion in doing so. (*G. L. Mezzetta Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1091.) The trial court's order of dismissal following the sustaining of a demurrer without leave to amend must be reversed if there is a reasonable possibility that any defect identified by the defendant can be cured by amendment. (*Id*. at pp. 1091-1092; *Terhell v. American Commonwealth Associates* (1985) 172 Cal.App.3d 434, 438.)

B. The Duty Requirement Necessary to Appellants' Legal Malpractice Claim

To state a cause of action for legal malpractice, a plaintiff must plead "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence. [Citations.]" (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) Because the trial court's decision to sustain

respondent's demurrer centered upon its finding that respondent did not owe appellants a duty, we focus on that issue.

Appellants' theory of duty was that respondent Peterson owed a "duty of due and proper professional diligence and care to [appellants] as the intended third-party beneficiaries of Helen['s] will." Because of respondent's breach of that duty, appellants suffered monetary losses. Appellants concede they were not respondent's direct clients. Therefore, in order to prevail on this cause of action, appellants must show that respondent owed them a legal duty to use professional skill, prudence, and diligence in dealing with non-clients who would have benefitted had respondent completed the trust and will amendments consistent with Helen's wishes.

The landmark case in which the California Supreme Court first recognized that an attorney may be liable in tort to non-client, third-party beneficiaries was *Lucas v. Hamm* (1961) 56 Cal.2d 583, 589 (*Lucas*). In that case, the court held that an attorney who erred in drafting a will could be liable to a non-client beneficiary named in a will who suffered damage as a result of the attorney's mistake. In rejecting the stringent "privity test," limiting an attorney's liability only to one's client, the *Lucas* court explained that the determination of whether an attorney will be held liable to a third person not in privity with the attorney is a matter of policy, and involves the balancing of many factors. These factors include the extent to which the transaction was intended to affect the plaintiff/beneficiary, the foreseeability of harm, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the attorney's conduct and the injury, and the policy of preventing future harm (the so-called "*Biakanja* factors").[3] (*Id.* at p. 588.) *Lucas* added to the "*Biakanja* factors" that courts must also consider whether the recognition of liability to third-party beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession. (*Id.* at p. 589.)

[3] *Lucas* drew these six factors from *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 (*Biakanja*), where a notary public who prepared a will that was improperly attested was held liable in tort to an intended beneficiary who was damaged due to the will's invalidity.

Usually, the question of whether the attorney owed a duty of care to the non-client beneficiaries, or potential beneficiaries turns on a judicial assessment of the "actual circumstances under which the attorney undertakes to perform his legal services . . . ." (*Heyer v. Flaig* (1969) 70 Cal.2d 223, 229, disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617.) Because of the nature of this inquiry, normally such claims are not well-suited for disposition by demurrer, unless the facts clearly and unequivocally show that the *Biakanja* factors do not favor imposition of a legal duty.

However, here respondent has drawn our attention to appellate decisions which have rejected claims for damages by potential estate beneficiaries made against a testator's attorney because a testator's final will did not leave them a bequest as intended. These cases, *Chang*, *supra*, 172 Cal.App.4th 67, and *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946 (*Radovich*), are dispositive of appellants' claims against respondent.

In *Chang*, the testator instructed his attorney to revise his trust to leave the entire estate to his new wife. (*Chang*, *supra*, 172 Cal.App.4th at p. 73.) The attorney refused, instead recommending a psychiatric evaluation before making any changes to his estate plan. (*Ibid.*) The testator died before making any amendments to his trust and his new wife sued for legal malpractice. (*Id.* at pp. 73-74.) The subsequent legal malpractice claim in *Chang* centered on plaintiff's allegation that the decedent's will did not accurately express his intent leading to the plaintiff not receiving the inheritance promised by the decedent.

After weighing the *Biakanja* factors as listed in *Lucas*, the *Chang* court found that four of the six factors clearly pointed towards extending the attorney's duty of care to include plaintiff Chang. (*Chang*, *supra*, 172 Cal.App.4th at p. 83.) However, the court concluded that the sixth *Biakanja* factor—whether extension of liability would "impose an undue burden on the profession"—was dispositive, and mandated rejection of the claim that estate planning attorneys owe a duty of care to unnamed potential beneficiaries. (*Id.* at p. 84.)

The court expressed its concern that allowing *any* disappointed potential beneficiary to sue the testator's attorney "without requiring an explicit manifestation of

the testator's intentions, the existence of a duty—a legal question—would always turn on the resolution of disputed facts and could never be decided as a matter of law." (*Chang*, *supra*, 172 Cal.App.4th at p. 83.) For this reason, expanding attorney duty to include beneficiaries who were not actually named in bequests would expose attorneys to limitless liability, and would inevitably be speculative. (*Id.* at p. 86.) Accordingly, the *Chang* court limited such legal malpractice claims to those involving a negligently drafted or executed testamentary instrument when the plaintiff was an "*expressly named* beneficiary of an *express bequest* . . . ." (*Id.* at p. 82, original italics.)

Similarly, in *Radovich*, the court held that practical and policy concerns dictate that an attorney does not owe a duty to a third-party whose rights are not evidenced by a signed testamentary document. (*Radovich*, *supra*, 35 Cal.App.4th at p. 946.) In *Radovich*, attorney Locke-Paddon prepared and delivered a rough draft of the decedent's proposed new will to the decedent for review, and waited for decedent's comments before he proceeded any further. (*Id.* at p. 952.) The decedent died before executing the new will, and plaintiffs sued the attorney for breach of fiduciary duty and legal malpractice, arguing that Locke-Paddon delayed in preparing the will and failed to encourage the decedent to take action once it was prepared. (*Id.* at pp. 952-953.)

The court rejected these claims, explaining that, "common experience teaches that potential testators may change their minds more than once after the first meeting. Although a potential testator may also change his or her mind after a will is signed, we perceive significantly stronger support for an inference of commitment in a signature on testamentary documents than in a preliminary direction to prepare such documents for signature. From a policy standpoint, we must be sensitive to the potential for misunderstanding and the difficulties of proof inherent in the fact that disputes such as these will not arise until the decedent—the only person who can say what he or she intended—has died." (*Radovich*, *supra*, 35 Cal.App.4th at p. 964, italics omitted.)

The rationale in *Radovich* is consistent with that employed by the *Chang* court, and is equally applicable in this case. Here, we have no writing confirming that Helen intended for appellants to be her beneficiaries. A signed testamentary document is the

threshold requirement to show a testator's intent to confer a benefit on third-party beneficiaries, and a "preliminary direction to prepare documents for signature" is not sufficient in and of itself to show such intent. (See *Radovich*, *supra*, 35 Cal.App.4th at p. 964.)

Furthermore, from a policy standpoint, we agree with the reasoning in *Radovich* that requiring a clearer commitment to benefit a third party in a signed testamentary document before imposing a duty on the testator's attorney to such third parties is proper, as it would avoid the potential for misunderstanding in cases such as this one, where the only person who can say what Helen truly intended—Helen—has died. (*Radovich*, *supra*, 35 Cal.App.4th at p. 964.)

Accordingly, the trial court's order sustaining the demurrer as to the legal malpractice claim is affirmed.

C. Appellants' Breach of Contract Claim

Appellants' breach of contract claim is based on the confusing allegation that they were the intended third-party beneficiaries of Helen's will, but that *respondent* breached "his contractual obligation to [appellants] as the intended third-party beneficiaries of [Helen's] will."

In order to pursue a breach of a third-party beneficiary contract claim, it was necessary for appellants to have pled that a valid contract was signed by the respondent, *as promisor*, conveying rights to appellants as third-party beneficiaries. (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830; *Mercury Casualty Co. v. Maloney* (2003) 113 Cal.App.4th 799, 802-803.) Respondent was not a party to Helen's will, nor could he have been, and the complaint does not allege any other contract to which respondent was a party in which appellants were intended beneficiaries. (*Brewer v. Simpson* (1960) 53 Cal.2d 567, 588-589 [mutual wills were sufficiently contractual in nature so as to be enforceable by intended beneficiaries.)

Thus, the allegations in appellants' complaint are insufficient to show that a valid contract existed between respondent and Helen that made appellants the third-party beneficiaries of *that* contract. Therefore, there is no prima facie showing that a contract

existed between Helen and respondent that would confer a benefit upon appellants as third-party beneficiaries. Accordingly, the trial court's order sustaining the demurrer as to the breach of contract claim is affirmed.

D. Appellants' Claim of Tortious Interference with Prospective Economic Advantage

Appellants contend that respondent committed a tortious (negligent) interference with their prospective economic advantage, because his inaction interfered with the inheritance that they expected upon Helen's death. Appellants assert that they had "legitimate, realistic expectations that each of them would receive 25 [percent] of Helen[']s estate upon her death" and that "Attorney Peterson [respondent] knew that Helen . . . intended to bestow on each of [*sic*] Mike and Jim [appellants] 25 [percent] of her estate upon her death." Despite his knowledge of Helen's wishes and that time was of the essence, respondent chose to delay his legal services, interfering with appellants' prospective economic advantage and causing them to suffer monetary losses.

The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that: (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship, and was aware or should have been aware that if he did not act with due care, his actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted; and (5) plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship. (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786.)

Therefore, under the third element, a plaintiff must plead sufficient facts to show that the defendant was negligent. A negligence action requires that a plaintiff show that the defendant owed him or her a legal duty of care. Applying the holding and rationale of *Chang*, *supra*, 172 Cal.App.4th at page 86, here respondent does not owe a duty of care

to appellants because there was no express bequest made by Helen evidencing that appellants were her intended beneficiaries. Accordingly, because there is no duty of care owed by respondent to appellants, there is no showing of negligence as required for appellants' claim of negligent interference with prospective economic advantage. We affirm the trial court's order sustaining the demurrer as to this claim.

IV.

DISPOSITION

The trial court's order sustaining the demurrer as to the legal malpractice, breach of contract claims, and tortious interference with prospective economic advantage, and dismissing appellants' complaint, is affirmed. Costs on appeal are awarded to respondent.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.